AUG 30 1961
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# Supreme Court of the United States

October Term, 1961

No. 371

BLAISE D'ANTONI & ASSOCIATES, INC.
and
BLAISE D'ANTONI,
Petitioners

versus

SECURITIES and EXCHANGE COMMISSION,
Respondent

## PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners seek *certiorari* to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of their petition, show:

## OPINIONS BELOW and JURISDICTION

The Court of Appeals rendered its judgment on April 20, 1961. The opinion is reported at 289 F2d 276, and is printed in Appendix A hereto.

The Court of Appeals denied a petition for rehearing on June 12, 1961, with an opinion reported at 290 F2d 688, also printed in Appendix A hereto.

## QUESTIONS PRESENTED

This case presents two important questions with respect to limitations on the stringent regulatory powers of the Securities and Exchange Commission, powers which are susceptible of abuse to the injury of all who, like petitioners, must deal with the Commission:

> 1—May an applicant for registration with the Securities and Exchange Commission, as a broker-dealer in over-the-counter securities, withdraw his application before the Commission acts thereon?
>
> 2—May the Securities and Exchange Commission revoke the registration of an inactive broker-dealer—instead of permitting it to withdraw voluntarily—for violation of one of the Commission's good-housekeeping rules, absent a showing that the general public and investors would, or could, be prejudiced by such withdrawal?

The holding on the first question by the Court of Appeals in this case, is inconsistent with this Court's holding, in *Jones vs Securities and Exchange Comission,* 298 US 1 (1936), that an applicant has an absolute right "to withdraw an ungranted application for any form of privilege in respect to which he is at the time alone concerned".

The Court's holding on the second point is effectively contrary to decisions in another circuit that the Commission's regulatory powers may not be exercised in a

punitive manner. See *Wright vs Securities and Exchange Commission*, 112 F2d 89 (CA 2-1940); *Securities and Exchange Commission vs Graye*, 156 FS 544 (SD NY-1957).

## STATUTES INVOLVED

The statutory provisions involved are sections 15(a), (b) and (c)(3) of the Securities and Exchange Act of 1934, 15 USC 78 o(a), (b) and (c)(3), printed in Appendix B hereto.

## STATEMENT OF THE CASE

In 1955, petitioner Blaise D'Antoni & Associates, Inc. registered with the Securities and Exchange Commission as a broker and dealer in over-the-counter securities.

Petitioner Blaise D'Antoni has been president, a director and the principal shareholder of the petitioner company since its organization.

As a broker and dealer, D'Antoni & Associates was required, by rule of the SEC, to maintain a certain ratio between indebtedness and net worth.[1] as protection for its customers against the risk of its insolvency.

From time to time, the Commission warned the company that it was not complying with the net capital rule, and in October 1959, a Commission investigator looked

[1] SEC Rule X15c3-1, 17 CFR 240.15c3-1, prohibiting a broker-dealer from permitting his aggregate indebtedness to exceed 2,000% of his net capital.

into the company's past operations and its financial position.

The investigator learned that, from April 30 to October 9, 1959, the company had effected a small number of transactions in over-the-counter securities, at times when the company's net capital was impaired.

These transactions were technically in violation of regulations promulgated by the Commission, under authority granted to it by section 15c(3) of the Securities Exchange Act.[2]

But the examination further showed that the company did not carry margin accounts; that all transactions during the period in question were on a cash basis, and were settled promptly; that the company had closed out, and settled in full, all accounts with its customers and other brokers; and that, in the words of the Court of Appeals, "the volume of business was small, the transactions were mostly with the D'Antoni family or with close friends, no losses were suffered by customers or other brokers or dealers, the affairs of the company have been settled in full, and the company has ceased to do business". R 18, 19, 39, 41; 289 F2d at 277.

The company then filed, at the suggestion of the investigator, a formal notice of withdrawal of its registration with the SEC. (R 40.)

[2] Section 15(c)(3) of the Act prohibits the use of the mails or interstate facilities by a broker or dealer, for securities transactions not on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe to provide safeguards with respect to the financial responsibility of brokers and dealers.

Later, Mr. D'Antoni filed a personal application with the Commission for registration as a broker and dealer.

Thereupon, the Commission notified D'Antoni & Associates and Mr. D'Antoni, that action on the company's withdrawal and on Mr. D'Antoni's application for registration would be deferred pending determination, after hearing, whether it should deny Mr. D'Antoni's application and revoke the company's registration, upon findings, first, whether such denial or revocation would be in the public interest, and second, whether the company or Mr. D'Antoni had violated wilfully any provision of the Exchange Act.[3]

A private hearing was held, at which Mr. D'Antoni withdrew his personal application for registration to signify that he did not intend to re-enter the securities business, and the parties stipulated the pertinent facts.

The Commission thereafter revoked the company's registration, and refused its request for permission to withdraw voluntarily; and it found that Mr. D'Antoni's actions were a cause for the order of revocation.

It also denied Mr. D'Antoni's application for registration, and refused to permit him to withdraw his application—an action which blemishes Mr. D'Antoni's reputation.

[3] Section 15(b) of the Act empowers the Commission to "deny registration to or revoke the registration of any broker or dealer, if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer, whether prior or subsequent to becoming such, or (2) any officer, director . . . of such broker or dealer . . . (D) has willfully violated any provision . . . of this chapter, or of any rule or regulation thereunder".

On review of the Commission's orders, the Court of Appeals approved the Commission's determination that Mr. D'Antoni did not have an absolute right to withdraw his application, and held that the Commission did not have to support its order (in the interest of the public) revoking the company's broker-dealer registration, by showing that actual injuries or losses were suffered by investors.

## ARGUMENT

### Mr. D'Antoni's Right to Withdraw

The Court of Appeals held that "in large measure, (this) case is controlled by *Peoples Securities Company vs Securities and Exchange Commission*" (reported at 289 F2d 268, April 20, 1961), in which the same court denied the existence of an absolute right to withdraw an application for registration as a broker-dealer, at any time before it becomes effective.

The Court thus refused to follow this Court's holding, in *Jones vs Securities and Exchange Commission*, 298 US 1, 23 (1936), with particular reference to applications filed with the SEC, that an applicant has an absolute right "to withdraw an ungranted application for any form of privilege in respect of which he is at the time alone concerned".

With respect to application of the *Jones* rule to the Securities Act of 1933, as amended in 1954, the Court of Appeals in the *Peoples* case, considered "that Jones has no application when withdrawal would frustrate the

purpose of the Act, cripple the investigative functions of the SEC, and allow the registration procedure itself to be used for fraud or deception" (289 F2d at 274).

The Court based its holding on analogy to its holding in a previous case,[4] that since the Securities Act now permits an issuer of securities to make offers for sale, and to solicit offers to buy securities, during the period after filing but before registration becomes effective, "public interest in the contents of a registration statement arises immediately upon filing and precludes any absolute right to withdraw", contrary to the *Jones* decision rendered prior to the 1954 amendment to the Act which permits pre-registration offers and solicitation.

The Court failed to give effect to the controlling distinction between the procedure for registration of securities, and the procedure for registration of broker-dealers, which leaves the *Jones* rule fully applicable in the latter situation.

Section 15(a) of the Exchange Act prohibits an applicant from engaging in the business of a broker and dealer in over-the-counter securities, directly or indirectly, until such time as his registration with the Commission under the Exchange Act has become effective.

Thus, contrary to the fear of the lower court, recognition of Mr. D'Antoni's notice of withdrawal of his application would not "nullify the effectiveness of the entire regulatory scheme designed to protect investors

[4] *Columbia General Investment Corp. vs Securities and Exchange Commission*, 265 F2d 559 (CA 5-1959).

against injury at the hands of persons guilty of misconduct under the securities laws",[5] since section 15(a) of the Exchange Act itself affords the requisite protection to public investors.

**The Company's Right to Withdraw**

The company effected transactions in over-the-counter securities, at a time when its net capital was impaired.

However, bare violation of a Commission rule may not serve as sufficient justification for exercise of its power to revoke the registration of a broker and dealer, instead of permitting voluntary withdrawal of such registration.

The Commission's power to revoke the registration is regulatory, not punitive, and may be exercised only if circumstances indicate that such exercise is required for protection of the public interest:[6]

> "The provisions of the Securities Exchange Act were not intended to be punitive in nature, but rather were designed to prevent certain practices which might prove detrimental to the public

[5] 289 F2d at 275.

[6] Section 2 of the Exchange Act (15 USCA 78b) states: "Transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce . . . and to insure the maintenance of fair and honest markets in such transactions."

> interest. The S. E. C. in short, became the guardian of the public in security transactions."[7]

*In the Matter of Peoples Securities Company*, Securities Exchange Act Release No. 5637 (1958), the Commission acknowledged that section 15b of the Act "is designed to protect investors against further injury at the hands of persons who have been found guilty of misconduct under the securities laws".

In the case at bar, the company voluntarily went out of business and attempted to withdraw its registration. Withdrawal was unaffected by any public interest, because such interest had already been protected amply when the company itself closed down its business, liquidated its accounts and withdrew.

The Commission—the Court of Appeals concurring—determined that the company's registration must be revoked because the company disregarded the net-capital rule in the face of warnings by the Commission staff, and thereby "subjected its customers to undue financial risks by conducting its business in violation of this rule" (R 41).

Yet, the Commission perforce conceded that no one had sustained losses or had otherwise been prejudiced by the company's past activities; and, as already stated, the company could not engage in further activities.

In these circumstances, the Commission's order revoking the company's registration, instead of permitting it to withdraw voluntarily, is punitive in nature, and

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[7] *Securities and Exchange Commission vs Graye*, 156 FS 544, 545 (SD NY-1957); *cf. Wright vs Securities and Exchange Commission*, 112 F2d 89, 94 (CA 2-1940).

contrary to a prior appellate holding as to the purpose and intent of the Exchange Act.[8]

## CONCLUSION

In a series of recent decisions, this Court has indicated its concern with the problems arising from the use of administrative powers, particularly by federal agencies, which affect private rights and stigmatize the good name of individuals. *Cf. Vitarelli vs Seaton*, 359 US 535, 546 (1959); *Greene vs McElroy*, 360 US 474 (1959); *Slochower vs Board of Education*, 350 US 551 (1956); *Peters vs Hobby*, 349 US 331 (1955); *Wieman vs Updegraff*, 344 US 183 (1952).

In this case, the Court of Appeals has sanctioned the use of administrative powers which this Court has declared do not exist; and has sanctioned the use of such powers in a way which goes beyond the requirements of public interest, unnecessarily to stigmatize petitioners and damage their reputations irreparably.

It is respectfully submitted that the case is appropriate for consideration and disposition by this Court; and that the writ should issue.

*Eberhard P. Deutsch*
Attorney for Petitioners

*Deutsch, Kerrigan & Stiles*
Of Counsel

August, 1961

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[8] See *Wright vs Securities and Exchange Commission*, 112 F2d 89 (CA 2-1940); *cf. Ver Hvl t & Co., Inc.*, 11 SEC 310 (1942), in which the Commission permitted a voluntary withdrawal on the stated ground that withdrawal would not be inconsistent with the public interest.

## APPENDIX A

## OPINION OF THE COURT OF APPEALS

WISDOM, Circuit Judge: Petitioners, Blaise D'Antoni & Associates, Inc., a Louisiana corporation organized in 1955, and Blaise D'Antoni, seek review of an order of the Securities and Exchange Commission. The order, based on a stipulation of facts, (1) revoked D'Antoni, Inc.'s registration with the Commission as a broker and dealer in securities, naming Mr. D'Antoni as a cause of the revocation, (2) denied the request of D'Antoni, Inc. for withdrawal of its registration, and (3) denied both Mr. D'Antoni's application for registration and his request to withdraw his application. In large measure, the case is controlled by *Peoples Securities Company et al. v. Securities and Exchange Commission*, No. 18,300, decided today. We affirm the Commission's order.

November 3, 1955, D'Antoni, Inc., registered with the Commission under Section 15(b) of the Securities Exchange Act of 1934, 15 USCA §780, as a broker and dealer in over-the-counter securities. Mr. D'Antoni has been president, a director, and the principal shareholder of the company since its organization.

SEC Rule X15c3-1, 17 C.F.R. 240.15c3-1, provides that no broker or dealer shall permit his aggregate indebtedness to exceed 2000 per cent of his net capital. From time to time the Commission warned D'Antoni, Inc., that it was not complying with the net capital rule. In October 1959 an investigator for the Commission, in the course of examining the company's books, ascer-

tained that from April 30 to October 9, 1959, the company had engaged in a number of transactions in over-the-counter securities at times when its net capital was impaired. The examination showed that the company had closed and settled in full all accounts with its customers and other brokers, had ceased its activities as a broker-dealer, and had made plans for an orderly liquidation of its assets. The investigator advised D'Antoni, Inc. to file a formal notice of withdrawal of its registration as a broker-dealer and to resign from the National Association of Securities Dealers, Inc. October 9, 1959, the company did so. Mr. D'Antoni, however, then filed a personal application for registration as a broker and dealer. The Commission notified D'Antoni, Inc., and Mr. D'Antoni, that action on the company's withdrawal and Mr. D'Antoni's application for registration would be held up, pending the determination at a hearing whether D'Antoni, Inc. and Mr. D'Antoni had engaged in willful violation of the Securities Exchange Act.

At a hearing before an examiner for the Commission, Mr. D'Antoni submitted a letter purporting to withdraw his personal application for registration. The parties agreed to a stipulation of facts, and waived further hearings. The Commission, limiting its findings to the occurrences between April 30 and October 9, 1959, held that the company, aided and abetted by D'Antoni, had willfully violated the net capital rule. Accordingly, the Commission revoked the registration of D'Antoni, Inc. and denied its request for withdrawal; and also denied Mr. D'Antoni's application for registration and his request for withdrawal.

Mr. D'Antoni contends that he had an absolute right to withdraw his application for registration at any time before it became effective. We denied the existence of such a right in *Peoples Securities Company, et al., v. S.E.C.*, No. 18,300; the act of filing creates a public interest that precludes an absolute right of withdrawal.

D'Antoni, Inc. contends that the order revoking its registration is so harsh and punitive as to constitute an abuse of the Commission's discretionary powers. The company argues that the bare violation of a Commission rule does not justify so severe a punishment, especially where, as here, the volume of business was small, the transactions were mostly with the D'Antoni family or with close friends, no losses were suffered by customers or other brokers or dealers, the affairs of the company have been settled in full, and the company has ceased to do business. The facts show that D'Antoni, Inc.'s non-compliance with the net capital rule is not a "bare violation". The financial impairment became increasingly more serious, and it was not inadvertent but a willful disregard of repeated warnings by the Commission's staff. The net capital rule is one of the most important weapons in the Commission's arsenal to protect investors. By limiting the ratio of a broker's indebtedness to his capital, the rule operates to assure confidence and safety to the investing public. The question is not whether actual injuries or losses were suffered by anyone. *Hughes v. S.E.C.*, D.C.Cir., 1949, 174 F.2d 969. D'Antoni, Inc., improperly—and willfully—subjected its customers to undue financial risks by conducting its business in

violation of this rule. Furthermore, even close friends and members of the D'Antoni family are entitled to the same protection as the general public.

In view of the company's violations in the past, the Commission was not unreasonable in attempting to protect the investing public against future violations. *Shuck v. S.E.C.*, D.C.Cir., 1958, 264 F.2d 358. The Commission's order is not punitive; it is not a penalty imposed on the broker. Revocation and denial of registration are but means to protect the public interest. *Pierce v. Securities and Exchange Commission*, 9 Cir., 1956, 239 F.2d 160, 163. See *Fleming v. Nestor*, 1960, 363 U.S. 603, 80 S.Ct. 1367, 3 L.Ed.2d 1435.

We hold that the Commission's order was not unlawful, improper, or an abuse of discretion. The order is

AFFIRMED.

**JUDGMENT OF THE COURT OF APPEALS**

Extract from the Minutes of April 20, 1961

This cause came on to be heard on the petition of Blaise D'Antoni & Associates, Inc. and Blaise D'Antoni, for review of orders of the Securities and Exchange Commission of April 19, 1960 in File No. 8-4642 and File No. 8-7929, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered. adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, affirmed.

## OPINION OF THE COURT OF APPEALS ON PETITION FOR REHEARING

PER CURIAM: In the original opinion in this case, this Court approved the Securities and Exchange Commission's (1) refusal to allow Mr. Blaise D'Antoni to withdraw voluntarily his application for registration with the Commission as a broker-dealer and (2) refusal to allow D'Antoni & Associates, Inc., to withdraw voluntarily its registration as a broker-dealer.

(1) On rehearing, Mr. D'Antoni points to Section 15(a) of the Securities Exchange Act of 1934, prohibiting an applicant from engaging in the business of a broker and dealer in over-the-counter securities until his registration becomes effective, and argues that Section 15(a) is an adequate safeguard of the public interest. Petitioner distinguishes the applicant for registration as a broker-dealer from the applicant for registration of securities, since the latter is allowed to make offers, but not sales, while the application is pending. Section 15(a) is a protection, when a broker-dealer applies for registration, that does not exist when an issue of securities is registered. Nevertheless, Section 15(a), alone and isolated, was not intended as the only safeguard of the public interest. Section 15(a) does not stand alone; it is integrally linked with Section 15(b) of the Act, and together they form part of the regulatory scheme for the long-range protection of investors. See *Peoples Securities Co. et al v. S.E.C.*, 5 Cir., 1961, No. 18300. When Mr. D'Antoni filed his application for registration, he placed himself under the Commission's "scrutiny". The withdrawal of an un-

granted application for registration as a broker-dealer may affect the public interest as well as the grant of an application. Cf. *Columbia General Investment Corp. v. S.E.C.*, 5 Cir., 1959, 265 F.2d 559. By attaching important consequences, vitally affecting the applicant and his future status, to the revelation of improper activities on the *applicant's* part, Congress indicated that an applicant subjects himself to the Commission's scrutiny from the moment he files his application for registration. He cannot escape those consequences by withdrawing in the face of an S.E.C. investigation. All the sanctions enumerated in Section 15(b) to be taken *before* the application becomes effective, would be nullified—indeed, they would be meaningless—if we held that an applicant had the absolute right to withdraw voluntarily. This Court did not overlook Section 15(a) in the original opinion, and petitioner's reliance on its provisions here does not persuade us that the reasons assigned in our first opinion are in any way erroneous.

(2) D'Antoni, Inc., contends the Court erred in holding that the Commission did not have to support its order revoking the Company's broker-dealer registration by showing that actual injuries or losses were suffered. The petitioner's argument assumes that the purpose of the Act is merely to protect investors against "continuing" injury at the hands of those guilty of misconduct. This interpretation is far too narrow: the Act is also designed to protect the investing public against undue financial risks and future violations. The need for such protection is not "indefinite and equiv-

ocal," as petitioner argues, where, as here, in the face of repeated warnings by the Commission staff, the broker wilfully disregarded one of the most important rules of the Commission.[1]

The petition for rehearing is

DENIED.

## ORDER OF THE COURT OF APPEALS DENYING REHEARING

Extract from the Minutes of June 12, 1961

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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[1] SEC Rule X15c3-1, 17 C.F.R. 240.15c3-1, prohibiting a broker-dealer from permitting his aggregate indebtedness to exceed 2000% of his net capital.

## APPENDIX B

SECURITIES EXCHANGE ACT OF 1934

OVER-THE-COUNTER MARKETS

SECTION 15. (a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

* * *

The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration pursuant to this subsection or in any document supplemental thereto or in any proceeding before the Commission with respect to registration pursuant to this subsection any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact; or (B) has been convicted within ten years preceding the filing of any such application or at any time thereafter of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securities Act of 1933, as amended, or of this title, or of any rule or regulation thereunder. Pending

final determination whether any such registration shall be denied, the Commission may by order postpone the effective date of such registration for a period not to exceed fifteen days, but if, after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, the Commission shall so order. Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer, or any broker or dealer for whom an application for registration is pending, is no longer in existence or has ceased to do business as a broker or dealer, the Commission shall by order cancel the registration or application of such broker or dealer.

* * *

(c)(3) No broker or dealer shall make use of the mails or of any means or instrumentality of inter-

state commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of brokers and dealers.